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No. ....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

On Appeal from the Supreme Court
of California

Petition for Certiorari--Criminal Case

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Questions Presented

Do the People of a State, acting collectively, have a right to due process of law under the Ninth and the Fourteenth Amendments to the United States Constitution, when they seek to promote justice and civil order by bringing criminal prosecutions?

Was this right to due process violated by the California Supreme Court in the present case, when, based almost entirely on the writings of individuals who were not examined and cross-examined by the parties, it concluded that any witness hypnotized before trial was totally incompetent to testify, no matter the method of inquiry undertaken and without regard to the results of that inquiry or its effect on the individual witness?

Was due process further violated when the California Supreme Court exempted criminal defendants from this total declaration of incompetence, and thereby sanctioned the presentation of evidence, by the Court's logic, of a suspect and nefarious nature, which other witnesses similarly hypnotized would be totally incompetent to present?

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THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

Petition for Certiorari--Criminal Case

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California, entered on March 11, 1982, reversing the judgment of conviction. A petition for rehearing was denied on June 4, 1982, and the opinion was ordered modified. The remittitur was

issued on June 7, 1982.

Opinion Below

The opinion of the California Supreme Court, reversing the judgment of guilty in People v. Shirley, (1982) 31 Cal. 3d 18, ___ Cal.Rptr. ___, appears as Appendix A of this petition. A copy of the California Supreme Court's order denying petition for rehearing, without opinion, appears as Appendix B, and an order modifying the opinion appears as Appendix C of this petition.

Jurisdiction

The judgment of the California Supreme Court was filed on March 11, 1982; a timely petition for rehearing was denied on June 4, 1982. This petition is filed within sixty days of that date, and is therefore timely. This Court's juris-

diction is invoked under 28 U.S.C., section 1257(3).

Constitutional Provisions Involved

United States Constitution, Amendments Nine and Fourteen.

The text of each of the above provisions is set forth in Appendix D to this petition.

Statement of the Case

On March 1, 1979, the District Attorney of Orange County filed a three-count information charging respondent Donald Lee Shirley, in Count One, with burglary in violation of California Penal Code section 459; in Count Two, with rape in violation of California Penal Code section 261(3); and, in Count Three, with oral copulation in violation of California Penal Code

section 288a(c). The information further alleged that during the commission of the offenses alleged in Counts One, Two, and Three, respondent personally used a deadly weapon within the meaning of California Penal Code section 12022(b). (CT 1-2.)[1/] On March 1, 1979, respondent was arraigned and pled not guilty. (CT 3.)

Trial by jury commenced on June 19, 1979. (CT 10-12.) On June 26, 1979, respondent was found guilty of burglary in the first degree, as charged in Count One; guilty of rape, as charged in Count Two; and not guilty of oral copulation, as charged in Count Three. In addition, the jury found not true the allegation of the use of a deadly weapon as charged in Count One, but found true the allegation of the use of a deadly weapon as charged in Count

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1. CT refers to the Clerk's Transcript on appeal.

Two. (CT 63-68.)

On August 10, 1979, probation was denied, and respondent was sentenced to the middle term of six years for the offense charged in Count Two. To that sentence was added a one-year enhancement pursuant to the 12022(b) finding. The trial court determined that the provisions of California Penal Code section 654 precluded punishment for the burglary charge, and the court made no mention of that offense during sentencing. (RT 513-516.)[2/]

Notice of appeal was filed on September 26, 1979.

On October 14, 1980, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment of the Superior Court.

On December 24, 1980, the California

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2. RT refers to the Reporter's Transcript on appeal.

Supreme Court granted a hearing, and, on March 11, 1982, reversed the judgment of the Superior Court.

Facts Relating to the Offense

On January 25, 1979, Catherine Crump was a bartender at Bud's Cove, a drinking establishment located in San Clemente. (RT 42-43.) On that date, Ms. Crump finished work at approximately 6:30 p.m., had several drinks, left the bar at 8:30 p.m., arrived at her apartment at approximately 9:00 p.m., and fell asleep on the couch. (RT 48-58.)

Later that evening, Ms. Crump awoke and discovered respondent naked and standing in front of her, holding a butcher knife. Respondent ordered Ms. Crump to get up, and directed her to the bedroom. In the bedroom, Ms. Crump was forced to orally

copulate respondent, was tied up, gagged, and raped. Ms. Crump attempted to look at respondent. Respondent struck Ms. Crump in the face, and told her not to look at him. Later Ms. Crump again tried to look at respondent; this time, respondent struck her very hard on the hip. (RT 59-72, 179.)

Respondent then cut Ms. Crump's bindings with a pair of scissors, pulled down Ms. Crump's gag, and pulled her into the living room. In the living room, Ms. Crump observed respondent's clothing lying on the floor, with a knife and screwdriver resting on them. (RT 73-77.)

In the living room, the pair sat on the couch, Ms. Crump attempting to befriend respondent, in the hope he would not kill her. After approximately half an hour, respondent left to get beer. Ms. Crump, fearing respondent's reaction, neither left the apartment nor called for help.

Respondent returned. (RT 77-82.)

Respondent and Ms. Crump resumed talking. The telephone rang. Ms. Crump answered the phone and discovered the caller was a girlfriend. Ms. Crump hung up and told respondent her girlfriend was coming over and he would have to leave. Respondent left. (RT 98, 124-126.)

Ms. Crump called the police. The police arrived, and transported her to a hospital. During the examination at the hospital, the doctor found a five-inch in diameter bruise on Ms. Crump's hip, and noted that she complained of pain in that area. The doctor also discovered wrinkling about her wrists, consistent with her hands having been tied with a fabric. (RT 107-108, 113.)

On April 30, 1979, Ms. Crump was hypnotized. Under hypnosis, she was able to recall events during the incident which

she had been unable to remember before the hypnotic session. (RT 146, 250-253, 255.)

Reasons for Granting the Writ

The People of the State of California, acting collectively, have a right to due process of law under the Ninth and Fourteenth Amendments to the United States Constitution, when they seek to promote justice and civil order by bringing criminal prosecutions. That right to due process was violated by the California Supreme Court, when, based almost entirely on the writings of individuals who were not examined or cross-examined by the parties, it concluded that any witness hypnotized before trial was totally incompetent to testify to any matter covered under hypnosis, no matter the method of inquiry undertaken and without regard to the results of that inquiry or its effect on the individual witness.

The California Supreme Court further denied the People their right to due process, when it exempted from this total declaration of incompetence criminal defendants, thereby sanctioning the presentation of evidence, by the Court's logic, of a suspect and nefarious nature.

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Argument

I

PERSONS, ACTING COLLECTIVELY AS REQUIRED BY STATE LAW THROUGH ELECTED STATE LAW-ENFORCEMENT OFFICIALS, IN ATTEMPTING TO PROMOTE JUSTICE AND AND THE RIGHT TO LIFE, LIBERTY, AND PROPERTY BY BRINGING CRIMINAL PROSECUTIONS, ARE ENTITLED IN THAT FUNDAMENTAL ENDEAVOR TO DUE PROCESS OF LAW AS GUARANTEED BY THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Preamble to the United States Constitution, in stating the very purpose for the document and indeed the very purpose of society, states:

> "We the people of the United States, in order to . . . establish justice, insure domestic tranquillity, . . . promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

That it is an essential component of justice that the People be entitled to due

process, was forcefully stated by this Court in United States v. Nixon (1974) 418 U.S. 683:

> ". . . 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S., at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." (Id., at p. 709.)

This Court went on to make clear that the People's right to criminal justice and to adequate process and procedural fairness is guaranteed by the Constitution. The Court stated:

"[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." (United States v. Nixon, supra, 418 U.S., at p. 712.)

The Court also observed that it was not concerned, in the Nixon opinion, with the balance between a President's generalized interests in confidentiality and the need for relevant evidence in civil litigation. The Court then stated, pertinent to the present inquiry:

"We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." (Id., at p. 712 fn. 19; emphasis added.)

The Court then made this statement:

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair

administration of criminal justice." (United States v. Nixon, supra, 418 U.S., at p. 713; emphasis added.)

These pronouncements, of course, mirror earlier, less complete statements of this principle. "[J]ustice, though due to the accused, is due to the accuser also." (Snyder v. Massachusetts (1934) 291 U.S. 97, 122.) "Society also has a right to a fair trial." (Fay v. New York (1947) 332 U.S. 261, 288.) "The people of the State are also entitled to due process of law." (Stein v. New York (1953) 346 U.S. 156, 197.)

It is of no consequence that this Court has not attributed the right of the People to due process and fair trial to any particular section or amendment to the Constitution. This Court, for example, has found a fundamental right to privacy, even though never explicitly stated in any part of the Constitution. The Court has found this right in either or both the Fourteenth

Amendment's right to personal liberty or the Ninth Amendment's general reservation of fundamental rights. (See Roe v. Wade (1973) 410 U.S. 113, 152-153.) (Justice Goldberg's concurring opinion, in Griswold v. Connecticut (1965) 381 U.S. 479, concerning the Ninth Amendment and the protection it affords to fundamental rights not explicitly listed in the Constitution, is particularly relevant. [Id., at p. 486 et seq.])

As noted, the Preamble indicates an essential purpose of the Constitution is to "establish justice." This Court, in Nixon, made clear a fundamental, constitutionally required component of justice is that the People be entitled to due process. Thus, just as with privacy, the People's right to due process must exist in the Ninth Amendment's reservation of rights and in the Fourteenth Amendment's guarantee of liberty and personal security. This right is far

more than penumbral. It is so fundamental, that it helps to make up the fabric across which the other shadows of constitutional liberty move.[3/]

It is, further, of no consequence that this People's right to due process abides, because of the nature of our prosecutorial system, in persons collectively rather than individually. Authority exists for the proposition that States of the Union are not "persons" for the purposes of the Fourteenth Amendment. (See South Carolina v. Katzenbach (1966) 383 U.S. 301, 323-324.)

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3. The existence of the People's right to due process is, in any case, obviously reciprocal to a criminal defendant's explicitly guaranteed rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution. Those rights guarantee ordered justice, which must clearly have as their corollary the guarantee that both parties to criminal litigations go forward, whenever possible, equally armed with those procedural rights necessary to an ascertainment of truth, and therefore to the justice guaranteed both the accused and the accuser.

Petitioner is unable to find any case applying this rule to a criminal prosecution, and, after United States v. Nixon, supra, such authority would in any case be overruled. It was, after all, the People of the United States whose right to due process the Court found of constitutional dimension in the Nixon case.

In California, individual persons are forbidden by law to bring criminal prosecutions. The power rests solely with the District Attorney and the Attorney General. (Hoines v. Barney's Club, Inc. (1980) 28 Cal.3d 603, 611; People v. Municipal Court (1972) 27 Cal.App.3d 193, 203-208.) The decision has been rationally made, that the People's constitutional right to criminal justice should be advanced and protected by agents elected by the People to so act. This necessary, collective approach does not in the least dilute the proposition that

each individual person has an interest in, and a personal right to, due process in the accomplishment of criminal justice. To conclude that a people's right to due process exists but cannot be asserted because of the necessary organization of the criminal prosecution mechanism, is to deny the constitutional imperatives stated in United States v. Nixon, supra.

It should be noted that petitioner recognizes the People's right to due process, while of obvious constitutional dimension, is not coextensive with the due process rights existing in individual criminal defendants. Petitioner does not contend that a precise balancing process must be carried on between the People's right to due process and the various due process rights of suspects and defendants. Petitioner's claim is a narrow one. Petitioner merely argues that it has a constitutional right

to those fundamental components of a fair trial, when the assertion of those rights, necessary as they obviously are to establishing justice, do not offend any legitimate right of the defendant. Thus, in Nixon, the People could assert their right to compulsory process against a non-defendant, since compulsory process was necessary to ensure the People's right to due process and ultimately to criminal justice. The defendant obviously had no cause to object to the assertion of that right, since it did not affect any legitimate right of his own. However, for example, the People could not assert a due-process right to discovery, if to do so would offend a defendant's right against self-incrimination.

In the present case, the actions of the California Supreme Court have denied

the People their right to due process, by denying fundamental components of a fair trial, when the People's assertion of those rights offends no legitimately assertable right of the defense.

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II

THE DECISION BY THE CALIFORNIA SUPREME COURT TO DECLARE ALL PERSONS INCOMPETENT TO TESTIFY TO ANY SUBJECT COVERED DURING A HYPNOTIC INTERVIEW, BASED ON SCIENTIFIC, AND LEGAL ARTICLES AND TREATISES, WITHOUT EXTENDING TO THE PARTIES THE RIGHT TO EXAMINE AND CROSS-EXAMINE THE AUTHORS OF THOSE DOCUMENTS, IS TO DENY THE PARTIES, AND IN THIS CASE THE PEOPLE, THEIR RIGHT TO DUE PROCESS

In the present case, the California Supreme Court creates a conclusive presumption declaring incompetent any witness (except a criminal defendant), who prior to trial had undergone a hypnotic interview concerning the subject matter of his proposed testimony, whether or not that interview resulted in any increased recollection and whether or not the proponents of the testimony intended to elicit at trial such additional

recollections. (Appen. A, pp. A-139 - A-142.) This determination and the manner in which it was reached raise serious federal constitutional issues. First, the process by which this determination was reached and the "evidence" on which it is based have denied to the People their right to due process.

To understand this denial, it is first necessary to review the evidence concerning hypnosis presented at trial. The People offered the testimony of a crime victim whose recollection had been, to a degree, enhanced by hypnosis. Objection was interposed, no evidence concerning hypnosis was offered, the trial court overruled the objection and the victim testified. During the defense case a psychiatrist testified concerning the dangers inherent in the forensic use of hypnosis. The defendant was convicted.

The California Supreme Court applied the Kelly-Frye (Frye v. United States (App.D.C. 1923) 293 F. 1013; People v. Kelly (1976) 17 Cal.3d 24) test for the admission of scientific evidence, viz. scientific evidence is admissible if the technique used is generally accepted in the scientific community to which it belongs. The Court looked in part to the defense evidence concerning hypnosis presented at trial, but relied to a far greater extent on a body of scientific and legal literature indicating dangers in the forensic use of hypnosis, and concluded that the technique was not generally accepted as a reliable device for improving recollection. The Court went on to declare that any witness, except a criminal defendant, who had been hypnotized before trial, was incompetent to testify concerning any matter covered while under hypnosis.

Petitioner argued that scientific literature was not evidence and could not be used to determine the attitude of an entire scientific community.

The California Supreme Court has attempted to meet this argument by stating such articles have only a limited utility. The Court stated they were doing no more than determining if, from a "fair overview" of the literature, it appeared that scientists, significant either in number or expertise, publicly opposed the use of hypnosis. The Court stated if that finding were made, then it could be safely concluded that the technique did not meet the general acceptance requirements of Kelly-Frye. (Appen. A, pp. A-98 - A-106.)

This conservative approach to the use of scientific literature has obvious practical appeal. The difficulty is that the California Supreme Court did not feel in

the least constrained by its own declaration of the limited uses to which such literature could be put.

The California Supreme Court did not merely conclude there was no general acceptance concerning the product of hypnotic sessions; it went much farther, and declared that any witness or victim (but not defendant) who had been hypnotized became incompetent to testify, whatever the nature and however complete the memory which existed before hypnosis, however expert the hypnotist, and even if the hypnosis resulted in the retrieval of no new recollections. (Appen. A, pp. A-139 - A-142.)

To arrive at this remarkable and devastating conclusion,[4/] it was necessary

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4. In the original version of its opinion the California Supreme Court declared that this rule of incompetence was to be given

for the California Supreme Court not merely to perform some objective and general overview of the literature, but rather it required the Court to rely on

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(Fn. 4 continued)

retroactive effect. (Appen. A, p. A-140, fn. 53.)

In the modified version of the opinion, the Court stated:

> "The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision." (Appen. C, pp. C-4 - C-5 [mod. 7].)

There is, therefore, an ominous cloud above this whole question. It is not impossible that in some future case the California Supreme Court will determine that the principles enunciated in Shirley have retroactive effect. If this occurs, many serious cases may have to be dismissed and others will go forward with relevant and even crucial evidence declared to be inadmissible. This potential makes even more dramatic the People's claim to denial of due process.

the conclusion of certain writers concerning the nature of hypnosis, its effect on recollection, and attitudes about recollection, and the effect of such on the competence of individual witnesses and victims (but not defendants) in individual specific cases.

Once the Court relied on these conclusions to declare hypnotized witnesses incompetent rather than using a broad overview merely to deny admission to the products of hypnosis, it violated the People's right to due process. When the Court relied on these conclusions, it no longer could hide behind the argument that it was merely determining whether the literature demonstrated or did not demonstrate a general acceptance of the technique. The Court had, therefore, moved byond its self-defined Kelly-Frye analysis, and had used the

literature to arrive at its own scientific conclusions and to make an all-encompassing (perhaps even retroactive) declaration of incompetence. (Except for criminal defendants, of course.)

In so doing, the Court declared witnesses incompetent based on the conclusions of "witnesses" whom they had never heard testify, whom the parties never examined or cross-examined, who might be alive or dead, in honor or disrepute, or who might have changed their minds.

It is certainly a fundamental component of any justice system, and the due process that makes it just, that the parties be allowed to confront the evidence detrimental to their position and to present evidence and witnesses favorable to their position. (See, e.g., U.S. Const., Fourth Amend.) In United

States v. Nixon, the People were found to possess a constitutional right to compulsory process. The right to process is, of course, meaningless if a court can deny to a party a hearing in which he can present and deal with the testimony or evidence so compelled. Essentially, in the present case, the People were denied such a hearing. No questions could be directed to the authors of any article nor was any opportunity available to offer any witness who could contradict the conclusions cited by the Court.

Next, the creation of a conclusive presumption of incompetence itself raises a grave federal constitutional question. In a society governed by law, the victim of a crime must rely on the law for protection. One can conceive of no more fundamental right than the right of a rape victim to give relevant testimony of facts

within her own knowledge at the trial of the rapist. Under the California Supreme Court's decision the victim in this case is denied that right because, having been hypnotized, she is conclusively presumed incompetent to testify. In view of the victim's manifest and substantial interest, it would appear she has a due process right to a hearing to determine whether she is incompetent to testify. (See Stanley v. Illinois (1972) 405 U.S. 645, 657-658.)

In proceeding in the manner in which it did and in creating a conclusive presumption of incompetence, the California Supreme Court denied to the People of the State of California a fundamental component of due process, the assertion of which would not have offended any constitutional right of the defendant.

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III

THE PEOPLE WERE DENIED DUE PROCESS WHEN, HAVING FOUND HYPNOSIS SO NEFARIOUS AND DANGEROUS A TECHNIQUE THAT NOT ONLY WAS ITS PRODUCT INADMISSIBLE BUT ITS SUBJECTS INCOMPETENT, THE CALIFORNIA SUPREME COURT NONETHELESS IN TWO SENTENCES EXEMPTED FROM THAT RULE CRIMINAL DEFENDANTS

Having spent 67 pages chronicling what it believed to be the unacceptable dangers of hypnosis, having recoiled in horror at the potential for overt and covert suggestion it found in hypnosis, having illuminated, to its satisfaction, the spectre of confabulation, having expressed its conclusion that hypnosis could be used purposely or accidentally to render a witness impervious to cross-examination, having declared any subject of hypnosis incompetent, no matter the technique used, the quality of memory before hypnosis, or the amount or recollection revived, the

California Supreme Court then in two sentences declared that this rule did not apply to criminal defendants. (Appen. C, p. C-4 [mod. 5].)

In a concurring opinion to his own majority opinion in People v. Williams, Justice Robert Gardner of the California Court of Appeal, Fourth Appellate District, after his perceptive criticism of the California Supreme Court's opinion in the present case, states:

> "Another aspect of Shirley disturbs me even more. In its modification Shirley determined that a defendant who submits to pretrial hypnosis may nevertheless testify [citation]. The idea that the predator may testify and yet his victim may not offends my sense of justice. It appears to me that the scales of justice are tilted--dangerously." (People v. Williams (1982) ___ Cal.App.3d ___ [slip opn: conc. opn., pp. 4-5, filed June 17, 1982, in 4 Crim. 12526].)

The California Supreme Court states the defendant's exception is based on his

fundamental right to testify in his own defense. Justice Otto Kaus of the California Supreme Court, in his concurring and dissenting opinion, as modified, retorts:

> "Finally, it seems to me that if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is unsupportable. Whether the right to testify in one's defense is 'fundamental' (People v. Robles (1970) 2 Cal.3d 205, 215) or constitutional (cf. Washington v. Texas (1967) 388 U.S. 14, 20-22), there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses. While I have tried to explain why, in my opinion, the majority goes much too far, if the majority's reasoning is correct, I can see no basis for excepting the defendant on trial." (Appen. C, p. C-8 [mod. 2].)

Clearly Justice Kaus is correct. A defendant has no constitutional charter

to offer with his testimony evidence that is irrelevant, immaterial, or incompetent. We do not allow a defendant to present hearsay, rumor or conjecture; we do not allow him to invade privileges; we do not allow him to testify if he refuses to take the oath. If a defendant makes an offer of proof that his testimony will involve only matters that are legally inadmissible, he simply cannot testify.

In the present case, the California Supreme Court determined that the subjects of hypnosis are so tainted, their memory so irrepairably altered, their vulnerability to cross-examination so changed, that they are incompetent to testify. Nonetheless, the California Supreme Court is prepared to allow such a risk to the truth-determining process by allowing criminal defendants to be hypnotized and then testify.

This rule creates the following, anomalous situations. Suppose, for instance, a victim and a suspect are placed in the same room. A single psychiatrist enters the room and simultaneously hypnotizes them. The psychiatrist then simultaneously questions the pair. Both the victim and the suspect tell exactly the same story, portions of which are incriminating and portions of which may be exculpatory. Under this bizarre rule established by the California Supreme Court, the suspect is allowed to testify, while the victim is shuffled off to some vague, shadowy legal existence shared by the severely retarded and the insane.

Another example is instructive. Suppose two individuals are suspected of committing a robbery. They are eventually arrested and defense counsel for

one of them has his client hypnotized. Under hypnosis, that defendant has certain recollections which are helpful to his defense. While that defendant is perfectly competent to testify in his own trial (supposing the trials are severed), he is incompetent to testify in the other defendant's trial. Thus, this individual suffers an even more bizarre fate than the victim who had been hypnotized, since he moves in and out of the legal netherworld of incompetence.

These hypotheticals indicate that the California Supreme Court's rule is capricious and nonsensical.

The California Supreme Court has determined that the defendant may present evidence in a trial which is, by the very standards established by the Court, of such a suspect character that it renders all other human beings incompetent to

testify. To create such a rule is to create a senseless and unsupportable double standard which is not compelled by any constitutional right held by the defendant and which therefore denies to the People their right to a fair trial and to due process of law.

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For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should be issued to review the decision of the Supreme Court of the State of California.

Respectfully submitted,

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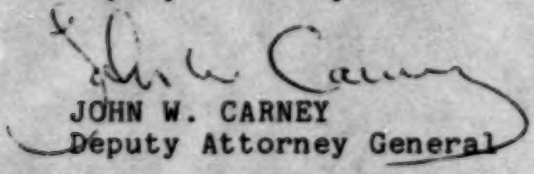

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PEOPLE OF THE STATE
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Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI--CRIMINAL CASE: An original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEPHEN C. HOSFORD
Attorney at Law
12832 Main Street
Garden Grove, California 92640

CECIL HICKS
District Attorney
County of Orange
Post Office Box 808
Santa Ana, California 92702

LEE A. BRANCH
County Clerk
County of Orange
Post Office Box 838
Santa Ana, California 92702
FOR DELIVERY TO
HON. MASON L. FENTON, JUDGE

CLERK OF THE COURT
Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street, Room 640
San Bernardino, California 92401

CLERK OF THE COURT
Supreme Court
State of California
350 McAllister Street, Room 4050
San Francisco, California 94102

Each envelope was then sealed and, with the postage prepaid, deposited in the United States Mail by me at San Diego, California, on the 13 day of July.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 13, 1982.

KAREN K. LUNA
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 03, 1984

Clifford E Reed Jr.
CLIFFORD E. REED, JR.

subscribed and sworn to before me
this 13th day of JULY, 1982.

Karen K. Luna
Notary Public in and for said County and State

AFFIDAVIT OF SERVICE BY MAIL